United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

B P/B

76-1154

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

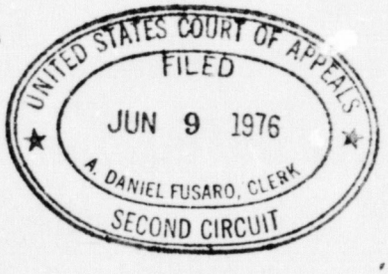
CLARENCE R. SEARS, JR.,

Defendant-Appellant.

Docket No. 76-1154

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the District Court erred by instructing the jury that a finding of extortion did not require that appellant's statement be perceived by a reasonable person as a fear-provoking threat.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable John M. Cannella) rendered April 5, 1976, after a jury trial, convicting appellant Clarence Sears, Jr., of extortion, in violation of 18 U.S.C. §894. Imposition of sentence was suspended and appellant was placed on probation for three years.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Sears was charged[1] with two counts of extortion in violation of 18 U.S.C. §894. At the close of the case, on defense counsel's motion, the trial judge consolidated the two counts, finding that they involved only one course of conduct (286[2]).

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[1]The indictment is B to the separate appendix to appellant's brief.

[2]Numerals in parentheses refer to pages of the transcript of the trial.

Evidence at trial established that appellant Sears lent James Johnson $2,000 so that Johnson could make a down-payment on a $43,000 house he was buying (52). Appellant Sears, an employee of the Government for 25 years, made the loan to Johnson because he had known Johnson as a friend and co-worker at the Post Office for approximately five years (209-210).

According to Johnson, appellant Sears gave him the money in early August 1975, told him he could repay the loan within three months, and rejected an offer of interest, suggesting that Johnson would have to pay "just a few dollars" (32-34). While at the time of the loan Johnson owned a 1971 Cadillac limousine and a Pontiac Ventura (54, 57), neither was proffered or requested as collateral for the loan.

At the end of October, Sears demanded repayment of the loan. After a few days Johnson complied by returning $1,000 of the loan, for which he demanded and received a receipt (35, 37).[3] At that point, appellant told Johnson that the balance due and owing was $1,600 (39).

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[3]Johnson claimed that he demanded the receipt because appellant attempted to cheat him by crediting him with returning only $800 (38). In contrast, appellant Sears described how Johnson pretended to give him $1,000, when in fact he turned over only $800. Caught in this ruse, Johnson corrected the deficiency (221).

On November 5, 1975, at approximately 8:00 a.m., appellant Sears, according to Johnson, approached Johnson at the Post Office and demanded the rest of his money (42). Johnson maintained that appellant then shouted, in a voice loud enough for the entire Post Office to hear (69),

> [i]f you don't have that money by Friday, I am coming to your house with my piece and I am going to blow you away.
>
> (42).

Johnson reported this incident to the postal inspectors. At their direction, Johnson telephoned appellant on Friday, November 7, 1975, in order to get Sears to repeat what he had said earlier (43-44). The conversation was tape-recorded, and the tape was introduced into evidence (45) and played for the jurors (47).[4]

In that conversation, appellant explained to Johnson that he had hoped to be repaid that day because he needed the money to help his wife, who was ill. In response, Johnson pleaded poverty, and suggested instead that he repay appellant in $100 installments every pay period until he could accumulate a sufficient sum to repay the balance, and promised that he would satisfy the entire debt by the end of December. Appellant consented to this proposal, saying:

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[4]By stipulation the tape has been docketed and made part of the record on appeal.

All right, I'll go along with that, but not after December, please.

In reference to their conversation the preceding Wednesday, appellant assured Johnson that he would not give him any trouble, and further explained that he had said what he did because he was angry at Johnson's having avoided him:[5]

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[5]In this conversation, appellant explained:

Sears: Well, I really meant it.

Johnson: I know you meant it, I know you meant it --

Sears: I wasn't bullshitting at all.

Johnson: I know you meant that Sears. I know you meant it.

Sears: But you know like I could pay $50.00 and that's it.

Johnson: Huh

Sears: I could pay $50.00 and the honeymoon is over, really.

Johnson: What do you mean, $50.00 for what?

Sears: Just in general to do anything to have you wasted or what.

Johnson: You mean you could pay $50.00 to have me blown away?

Sears: I could do it in a minute. All I do is pick up a phone.

Johnson: I mean do you know what that means to me Sears, I mean you know like uh...I hope...I hope you're gonna go along with this thing and not like see me Monday and come with a different, a different thing.

Sears: No, no, no I'm not going to go along and cause no problem after Monday. You are talking to me and this is what piss[ed] me off you didn't pick up the phone prior to this and be like a man and rap to me prior to this Johnson.

Johnson: Yeah, I understand.

Sears: This is all I wanted you to do.

Johnson: Right.

Sears: What did I tell you to do?

The defense presented substantial evidence to prove that the loan had been made in June 1975 -- not August -- and that Johnson had lied and reneged on his acknowledged promise to repay the loan within three months. Toward that end, Karen McNulty, a pre-medical student at Rutger's University, testified that one Saturday in June she accompanied appellant to the Ponce de Leon Bank and saw him withdraw $2,000 from his account and give it to Mr. Johnson (125).[6] The defense also introduced the Ponce de Leon bank book, reflecting the only bank account appellant has (214), which revealed a $2,000 withdrawal on June 14, 1975, leaving a total balance of $2,915.51 (215).

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[6]Appellant further explained that he had to drive Ms. McNulty, a friend of his son's, to Alexander's Department Store, and stopped at the bank on the way (213).

Further support for the theory that Johnson had lied about the date of the loan and was consequently two months in default in repayment is found in the tape of the November 7 conversation. In it Johnson does not deny that he had been avoiding payment and at one point says of the delay, "I mean I feel bad about this myself."

Appellant Sears, a Korean war veteran and father of five children, was never previously convicted of a crime (204-210). Although he admitted using very strong words, intending them to have a "psychological" effect on Johnson and get him to repay the loan (234-237), Sears explained that his remarks were the result of continued frustration at trying to get Johnson to recognize the loan for which payment had been due in mid-September (217-218). While appellant conceded that he had told Johnson he would come to his house with "his piece" (273),[7] he denied that he now or ever had had a gun (238), that he had the ability or connections to rely on "others" to enforce the debt (237), or that he ever intended to harm Johnson (236).

Through the testimony of four other co-workers in the Post Office -- Felipe Felix (140), Joseph Stokes (153), George Grajales (161), and Edward Elfe (178 -- the defense established

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[7]Appellant explained that, contrary to Johnson's testimony, he had not made this statement at the Post Office, but rather on an occasion when he encountered Johnson on the street (268, 275).

that, despite Johnson's testimony, appellant had not menaced Johnson in the Post Office on the morning of November 5, 1975.[8] The defense also presented the testimony of four co-workers -- Steven Morris (122), William Wherry (135), Felix (141), and Grujales (167-168) -- all of whom asserted appellant's reputation at the Post Office for honesty, integrity, and peacefulness. In addition, the defense presented the testimony of Napoleon Holmes, the executive director of the New Rochelle Community Action Agency (187). Holmes, who has known appellant for eleven years, revealed that Sears had done volunteer work with young people at the agency, as well as work with the NAACP and the United Tenants' Council (188).[9] Holmes asserted that appellant's reputation in the community is one of "honesty, integrity, and commitment to helping other people" (190). Holmes's own opinion of appellant is that

> ... he is an outstanding citizen of a community, of our community, he is honest, he is sincere, he is dedicated.
>
> (191).

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[8] Johnson contended that the threat had been heard by Alberta Young (93-96), a co-worker who it appears was a "close associate of Johnson's" (139, 174).

[9] The Tenants' Council is a neighborhood association for the improvement of local living conditions (188).

After Judge Cannella charged the jury (328-355)[10] and there had been some deliberation, the jurors returned to ask for (1) a re-statement of the elements of the crime, (2) the bank book, (3) the receipt, (4) a re-playing of the tape, and (5) the testimony concerning appellant's acknowledgment that he had told Johnson "he would be at his house and blow him away" (35). After further deliberations, the jury returned with another note which questioned whether the "victim" must be frightened, or does the fact that a threat was made stand by itself?" (365-366).

Over defense counsel's objection (367-368), Judge Cannella charged:

> ... You recall the statute says that extortionate means is defined as follows: Any means which involves the use or an express or implicit threat or use of violence or other criminal means to cause harm to the person, reputation or property of any individual. So that is what we mean by an extortionate means. Extortion as far as this statute is concerned includes any act or statement which constitutes a threat if it instills fear in the person to whom they are directed or are reasonably calculated to do so in the light of the surrounding circumstances. In answer to your specific question, must the victim feel frightened as a result of what is said? No, [it] doesn't make any difference whether he gets frightened or not. In reference to the second part of it, does the fact that the threat was made stand by itself? Yes. In other

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[10] The complete charge is C to the separate appendix to appellant's brief.

> words, you are to consider what the defendant said and what he intended the effect that would have on the other person. What he, the sayer, the deliverant, what he intended that statement, what effect that would have on Johnson. So the fact that Johnson was or was not afraid actually as a fact is not relevant in this case. What is relevant is when Sears said that, what did he intend to convey to Johnson? Did he intend to put him in fear? Did he intend to use his language, to use psychological force to force him to pay this? If that is what he intended, then he violated the law. Is that clear? All right. You may return to deliberate.
>
> (366-367).

Continued deliberations produced another note which inquired whether a "verdict can be made with a recommendation" (368). After the District Judge answered that question in the negative, the jury returned with a verdict of guilty (370).

At sentence, Judge Cannella, concerned about the collateral effects of the conviction on appellant's ability to retain his job at the Post Office,[11] said:

> Well, I certainly intend to put him on probation so I do not know that any great talk need be made on leniency. As a matter of fact, I was trying to figure out some way in which to help him. We did make inquiry from the post office up there, and they gave my law clerk some sort of explanation to the effect that it is not automatic, and since it is not related to post office business, it may be that he will not be discharged; but

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[11] At the time of sentence the Post Office had terminated appellant's employment. Sears is currently pursuing his administrative appeals from that determination.

that is not a promise on anybody's part, because we were talking in hypothetical fashion.

I originally started this because I wanted my law clerk to find out whether there was a section in the law which would give the court a right to make a recommendation to the Post Office authorities, similar to the one that arises when a person is charged with a narcotic violation and he is subject to deportation within 30 days that the judge can make an application to Immigration. I never found the section under which we could do that, as far as this is concerned, but I still think if they get a proper outlook on this case -- and it really had nothing to do with the running of the post office, it only accidentally happened in the post office to some extent -- part of it did. So I am inclined to think that they would take that into consideration in light of his 25 years of service.

I would indicate on the record that the Post Office authorities requested that I would order probation to give them a copy of the probation report so that they can use it while they are making a judgment on whether or not he should be kept on.

(S.11-12[12]).

While the court below denied the defense motion to dismiss the case for want of Federal jurisdiction, Judge Cannella commented, as he had earlier (115-116), that the case was one which should have been handled by local State authorities (S.14). Imposition of sentence was then suspended and appellant placed on probation for three years (S.15).

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[12]Numerals in parentheses preceded by "S" refer to pages of the transcript of the sentencing proceeding dated April 5, 1975.

ARGUMENT

THE DISTRICT COURT ERRED BY INSTRUCTING THE JURY THAT A FINDING OF EXTORTION DID NOT REQUIRE THAT APPELLANT'S STATEMENT BE PERCEIVED BY A REASONABLE PERSON AS A FEAR-PROVOKING THREAT.

After deliberating and after rehearing the tape recording and specified testimony, the jury tendered an inquiry clearly focused on the critical issue of whether, in the context of this case, appellant's statements to Johnson constituted extortion. Specifically, the jury asked:

> [M]ust the victim feel frightened as a result of what is said or does the fact that a threat was made stand by itself?

The law in this Circuit makes plain that the correct answer to both prongs of the question is "no." United States v. Natale, 526 F.2d 1160, 1168 (2d Cir. 1975).

In Natale, the issue was whether prosecution under 18 U.S.C. §894 required the Government to prove actual fear. Answering the question in the negative, this Court approved a charge given there which required a finding that

> ... an ordinary person would have been put in fear of immediate bodily harm or future bodily harm from anything that the defendant said or did....
>
> Id., 526 F.2d at 1168. Emphasis added.

The panel found that §894 was satisfied by a determination that a reasonable man, in light of all the surrounding

circumstances, would be fearful. In essence, the opinion gives the Government two options: it can meet its burden by establishing either that the alleged victim was actually afraid[13] or that the defendant's intentional actions would reasonably induce fear in an ordinary person. Therefore, the answer to the second part of the jury's question here -- whether a threat can "stand alone" -- is "no."

While Natale acknowledges that the statute is keyed to the actions and intentions of the defendant, the opinion makes clear that those actions cannot be assessed in a vacuum. Impotent actions sincerely intended to frighten simply are not enough; the context in which they are received is intrinsic to the requisite determination.

The force of this rationale is compellingly demonstrated by images of a 95-pound weakling threatening fisticuffs with Muhammad Ali to collect a debt. Although the weakling may be earnest and intend to compel payment by his actions, the absence of Ali's actual fright or the impossibility that any

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[13] It is this alternative theory of proof which makes relevant and admissibile evidence of the complaining witness' state of mind. United States v. Frazier, 497 F.2d 983, 986 (2d Cir. 1973); United States v. Zito, 467 F.2d 1401, 1404 (2d Cir. 1972); United States v. DeCarlo, 458 F.2d 358, 367 (3d Cir.), cert. denied, 409 U.S. 843 (1972).

reasonable man with Ali's physical prowess would be frightened precludes a completed crime.[14] To conclude otherwise is to elevate what the rational world would view as an absurdity to the importance of a Federal felony.[15] Unfortunately, Judge Cannella's supplemental charge directed the jury to do exactly that. In his supplemental instruction, the Judge said:

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[14] At most these facts constitute an attempt to use extortionate methods to collect a debt, a crime not punishable under §894, which sanctions attempted collection by use of actual extortion. There being no general Federal attempt provision, an attempt is not a Federal crime unless specifically provided in the statute. Rule 31(c), Fed.R.Crim.P.; United States v. Padilla, 374 F.2d 782, 787 n.6 (2d Cir. 1967).

[15] As it is, the Court's analysis in Natale of §894 marks a significant departure from the traditional law of extortion which has always required a showing of actual fear (see United States v. DiStefano, 429 F.2d 344, 346 (2d Cir. 1970); United States v. Carbo, 314 F.2d 718, 740-741 (9th Cir. 1963):

> In the cases of extortion based upon fear of violence the facts of fear, actual or anticipated, and of its reasonableness, are vital factors. To prove a substantive act of extortion it is essential to show the generation of fear in the victim [citing to Bianchi v. United States, 8 Cir. 1955, 219 F.2d 182, 188-190, cert. den., 349 U.S. 915, 75 S.Ct. 604, 99 L.Ed. 1249, rehearing den., 349 U.S. 969, 75 S.Ct. 879, 99 L.Ed. 1290; Nick v. United States, 8 Cir. 1941, 122 F.2d 660, 671, cert. den., 314 U.S. 687, 62 S.Ct. 302, 86 L.Ed. 550, rehearing den., 314 U.S. 715, 62 S.Ct. 411, 86 L.Ed. 570, reh. den., 316 U.S. 710, 62 S.Ct. 1103, 86 L.Ed. 1776. See United States v. Compagna, 2 Cir. 1944, 146 F.2d 524, 528, cert. den., 324 U.S. 867, 65 S.Ct. 912, 89 L.Ed. 1422, rehearing den., 325 U.S. 892, 65 S.Ct. 1084, 89 L.Ed. 2004.] To prove a substantive act of attempted extortion, it is necessary to prove an attempt to instill fear....

> ... In answer to your specific question, must the victim feel frightened as a result of what is said? No, [it] doesn't make any difference whether he gets frightened or not. In reference to the second part of it, does the fact that the threat was made stand by itself? Yes. In other words, you are to consider what the defendant said and what he intended the effect that would have on the other person. What he, the sayer, the deliverant, what he intended that statement, what effect that would have on Johnson. So the fact that Johnson was or was not afraid actually as a fact is not relevant in this case. What is relevant is when Sears said that, what did he intend to convey to Johnson? Did he intend to put him in fear? Did he intend to use his language, to use psychological force to force him to pay this? IF that is what he intended, then he violated the law....

The plain and necessary result of this charge was to direct the jury to look only at what appellant Sears had admittedly said and intended, and not to consider the effect the statement actually did have or reasonably should have had on Johnson. Despite defense counsel's objection that the charge deprived appellant of his right to have the jury assess the statements made in their full and proper context, Judge Cannella refused to correct the error.[16]

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[16] In his original charge, and at the outset of the supplemental charge, Judge Cannella instructed in substantial accord with Natale. However, those instructions were abstract and general. That the original charge was not sufficiently explicative is demonstrated by the jury's need to ask the question here at issue. While the response to the question was specific and comprehensible, it contained this fundamental error. Delivered as the final word to the jury, the necessary effect on the verdict is indisputable. Bollenbach v. United States, 326 U.S. 607, 613-614 (1946).

On the facts of this case, the error was of particular significance. This case is the realization of the prophecy -- discounted as dubious by this Court in United States v. Perez, 426 F.2d 1073, 1080 (2d Cir.1970), affirmed, 402 U.S. 146 (1971) -- that the Federal government would become involved in a prosecution occasioned by a loan from one friend to another. Apart from the obvious considerations of prosecutorial and judicial efficiency -- the demands such wholly local crimes will place on the limited resources of Federal law enforcement -- the context of prior friendship and familiarity is highly relevant to assessing the import of the words exchanged between debtor and creditor.

Appellant Sears was entitled to have the jury consider the following facts in assessing the significance of the statements: (1) that appellant and Johnson were friends and co-workers who had known each other for five years; (2) that Johnson had been to appellant's home; and (3) that Johnson knew appellant's family and was aware that he had five children and a wife who was ill. Further, and particularly probative on this issue, was the fact obviously known to Johnson that appellant enjoyed a reputation among his co-workers for peacefulness and integrity.

Also appropriate to this analysis is the seriousness a reasonable person would attribute to the "menacing" statements made, according to Johnson's own testimony, loud enough for the entire Post Office to hear.

When these facts are balanced against Johnson's behavior in failing to repay the debt when due and avoiding any situation with appellant in which he might have to explain his default, it was open to the jury, if properly instructed, to conclude that a reasonable man in Johnson's position would have believed that the November 5 and 7 statements were the product of understandable anger and frustration, not made in seriousness, and therefore not frightening.

Because the Judge's supplemental charge precluded the jury from making this analysis, the conviction must be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed and the case remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

June 9, 1966

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Louis Lenobey